

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JOSEPH MARICH,

Defendant-Appellant.

UNPUBLISHED

June 29, 2001

No. 221889

Macomb Circuit Court

LC No. 98-002627-FH

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of bank robbery, MCL 750.531. Defendant was sentenced to twenty to forty years in prison as a fourth habitual offender, MCL 769.12. Defendant appeals by right. We affirm.

First, defendant argues that he was denied his due process right to a fair trial because Makar's in-court identification of defendant was the product of a suggestive photo display by Fleming. We disagree.

The credibility of identification testimony is a question for the trier of fact that this Court will not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). "Moreover, this Court has stated that positive identification by witnesses may be sufficient to support a conviction of a crime." *Id.* If a witness is exposed to an impermissibly suggestive identification procedure, "the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). "[A]n improper suggestion often arises when 'the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person.'" *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), quoting *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973). "Moreover, when 'the witness is shown only one person or a group in which one person is singled out in some way, [the witness] is tempted to presume that he is the person.'" *Gray, supra*, quoting *Anderson, supra*. If there were an invalid identification procedure, the next step in the analysis is to determine whether the victim had an independent basis to identify the defendant. *Gray, supra* at 114-115. "The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the 'totality of the circumstances.'" *Id.* at 115,

quoting *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 LEd 2d 401 (1972). This Court should use the following eight factors in determining if an independent basis exists:

1. Prior relationship with or knowledge of the defendant. 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor[s] affecting sensory perception and proximity to the alleged criminal act. 3. Length of time between the offense and the disputed identification. . . . 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description. 5. Any previous proper identification or failure to identify the defendant. 6. Any identification prior to lineup or showup of another person as defendant. 7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . . 8. Any idiosyncratic or special features of defendant. [*Gray, supra*, at 115-116, quoting *People v Kacher*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).]

In *Gray, supra* at 111, a police officer told the victim that her assailant had been arrested and showed her a single color photograph of the defendant. The Court found that the officer's action was highly suggestive. *Id.* The instant case is distinguishable from *Gray*. First, when Fleming showed Makar the surveillance photograph, defendant was not in custody. Second, Fleming testified that when he showed Makar the surveillance photograph, he did not know the identity of the individual in the photograph. Third, at the time Fleming showed Makar the surveillance photograph, defendant was not a suspect in the robbery. For these reasons, the instant case can be distinguished from *Gray*. Moreover, the general use of such surveillance photographs to identify a subject is not impermissibly suggestive because “such films provide a memory-refreshing device, showing ‘the man who actually committed the robbery’ as opposed to the picture of ‘some possible suspect in the police files.’” *People v Kurylczyk*, 443 Mich 289, 309-310 (Griffin, J.), 318 (Boyle, J. concurring in part and dissenting in part); 505 NW2d 528 (1993), quoting Sobel, *Eyewitness Identification*, § 5.3(g), p 5-44. Therefore, the photograph Fleming showed Makar was not impermissibly suggestive.

Next, defendant argues that he was deprived of his right to an impartial jury when the trial court dismissed juror Jones without asking any questions. We disagree.

Defendant failed to preserve this issue by objecting at trial. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The plain error standard of review or the forfeiture rule applies to unpreserved constitutional issues. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights. *Id.* at 763.

Having determined that the plain error rule applies to defendant's claim, the next step is to determine if defendant may avoid forfeiture of the alleged error. *Id.* at 768. The first step under the plain error rule is to determine if an error actually occurred. *Id.* In the instant case, defendant has failed to show that there was an error. Defendant has not presented any legal authority supporting his contention that the trial court erred when it did not question Jones when she was dismissed. Thus, defendant abandoned this claim on appeal. *Davis, supra* at 700. Moreover, questioning Jones was unnecessary because at the conclusion of the first day of trial,

the court told the jury “not to discuss the case among themselves or with anyone else.” It is presumed that jurors will follow jury instructions. *People v Banks*, 438 Mich 408, 418; 475 NW2d 769 (1991). Further, defendant has not presented any evidence showing that Jones or any other juror did not adhere to the court’s instruction. Therefore, defendant was not deprived of his right to an impartial jury when the trial court dismissed Jones without asking any questions.

Finally, defendant argues that the sentence imposed by the trial court is disproportionate to the seriousness of the offense he committed and was an abuse of discretion. Again, we disagree.

In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The purpose of the habitual offender statutes is to provide for escalating penalties for individuals repeatedly convicted of felonies. *People v Stoudemire*, 429 Mich 262, 264; 414 NW2d 693 (1987). Defendant maintains that the trial court abused its discretion when it sentenced him to a minimum of twenty years. Essentially, defendant is arguing that the sentence was disproportionate.

Review of defendant’s sentence is limited to considering whether the sentence is within the statutory limits established by the Legislature and if the defendant has the ability to conform his conduct to laws of society. *Hansford, supra* at 326. Defendant’s sentence was within the statutory limits. Bank robbery is an offense punishable by imprisonment for a maximum term of life or any number of years. MCL 750.531. Pursuant to MCL 769.12, the trial court was allowed to enhance defendant’s sentence to life or any other term of years. Thus, defendant’s sentence of twenty to forty years was within the statutory limits. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). Defendant argues that because he did not carry a weapon when he robbed the bank and the fact that his last conviction was in 1987, shows that he does not deserve such a harsh sentence. However, when the trial court sentenced defendant, the trial court made reference to defendant’s two prior convictions for armed robbery and the great deal of prison time defendant had served. After considering these factors, the court concluded that defendant was “clearly a danger to society.” In light of the seriousness of the crime, defendant’s criminal history, and the fact that the sentence was within the statutory limits, the trial court did not abuse its discretion. *Id.* at 252-253.

We affirm.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey